

17 November 1997

Re: NEPA Technical Inquiry 0189 - Result of NHPA Finding of Adverse  
Effect on Environmental Assessment

Dear NEPA Call-In User:

This letter is in response to your October 31, 1997, inquiry to NEPA Call-In concerning an Environmental Assessment GSA has prepared on a build-to-suit lease. You stated that the proposed building site contains a historic building, and that GSA plans to move the building to another site which is in an historic part of town. GSA is also conducting a Section 106 review in accordance with the National Historic Preservation Act (NHPA). Specifically, you wanted to know if the Section 106 review finds that moving the historic building will be an adverse effect under the NHPA, can GSA still issue a Finding of No Significant Impact (FONSI) under the National Environmental Policy Act (NEPA)? In a follow-up phone call you stated that GSA has also considered other alternatives, including building on a different site, but moving the building is considered to be the "best" alternative of those that have been considered for this proposed action. This Technical Inquiry is pending approval of our QA/QC Section and the GSA. A Final Technical Inquiry will be mailed to you.

#### SUMMARY OF FINDINGS

NEPA Call-In found that a Memorandum of Agreement (MOA) under Section 106 of the NHPA can be used as the basis for a mitigated FONSI. Council on Environmental Quality (CEQ) guidance and the PBS NEPA Desk Guide discuss when use of a mitigated FONSI is appropriate. NEPA Call-In's detailed findings are presented below.

#### DETAILED FINDINGS

NEPA Call-In contacted Expert Advisor, GSA National Office. The Advisor stated that the GSA Environmental Quality Advisory Group (EQAG) discussed this issue during their revision of the GSA NEPA Desk Guide. The EQAG determined that if GSA executes an MOA under Section 106 of the NHPA with the Advisory Council on Historic Preservation, the State Historic Preservation Officer, and other interested parties as appropriate, then GSA may use the MOA as the basis for a mitigated FONSI, provided (a) there are no other impacts of the action that appear to be significant, and (b) GSA, having taken a hard look at the action and its impacts, concludes that implementing the MOA will reduce the impacts below the level of significance.

The Advisor also referred us the PBS NEPA Desk Guide Chapter 6, Environmental Assessments, Section 6.10.1, Finding of No Significant Impact - Definition. This section states: "A mitigated FONSI may be especially appropriate where the only anticipated impacts will be on historic properties, and mitigation is agreed to under the regulations for Section 106 of the NHPA (36 CFR 800). The mitigation measures agreed to must be specified in the FONSI, and must be sufficient to reduce the impacts of the project below a significant level."

NEPA Call-In also reviewed the CEQ document "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" for further guidance on mitigated FONSI's. Question 40 (enclosed) asks, "If an environmental assessment indicates that the environmental effects of a

proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?" The CEQ answer states, "Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement...In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action."

NEPA Call-In then reviewed the PBS NEPA Desk Guide, Interim Guidance, September 1997. As of August 3, 1997, the measurements and procedures outlined in the PBS NEPA Desk Guide shall serve as "interim guidance" for PBS NEPA compliance activities, pending official issuance of ADM 1095.1F and PBS 1095.4C which are contained in Appendix 1 of the "Desk Guide. The PBS NEPA Desk Guide discusses a "mitigated FONSI" and lists four criteria in Section 6.8.1 which must be met in order for a mitigated FONSI to be valid:

- 1) GSA must have accurately identified the relevant environmental concern;
- 2) Once GSA has identified the problem it must have taken a "hard look" at the problem in preparing the EA;
- 3) If a FONSI is made, GSA must be able to make a convincing case for its finding; and
- 4) If GSA does find an impact of true significance, preparation of an EIS can be avoided only if GSA finds that changes or safeguards in the project sufficiently reduce the impact to a minimum.

The Desk Guide also cautions that many Federal courts will not allow the use of a "mitigated FONSI" because if there are significant impacts, NEPA requires the preparation of an EIS.

The materials in this TI have been prepared for use by GSA employees and contractors and are made available at this site only to permit the general public to learn more about NEPA. The information is not intended to constitute legal advice or substitute for obtaining legal advice from an attorney licensed in your state and may or may not reflect the most current legal developments. Readers should also be aware that this response is based upon laws, regulations, and policies in place at the time it was prepared and that this response will not be updated to reflect changes to those laws, regulations and policies.

Sincerely,

(Original Signed)

NEPA Call-In Researcher